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**ADJUDICATIONS UNDER THE CONSTRUCTION CONTRACTS ACT 2002
FAMILY TRUSTS, BODIES CORPORATE AND COMPANIES**

RELEVANT LEGISLATION

Construction Contracts Act 2002

Commercial construction contract – means a contract for carrying out construction work in which none of the parties is a residential occupier of the premises that are the subject of the contract.

Construction site – means the land on which the claimant has been carrying out construction work under the relevant construction contract.

Dwelling house – means any building that is occupied as a residence.

Owner – means the owner of a construction site.

Residential construction contract – means a contract for carrying out construction work in which one of the parties is the residential occupier of the premises that are the subject of the contract.

Residential occupier – means an individual who is occupying, or who intends to occupy, the premises that are the subject of a construction contract wholly or mainly as a dwelling house.

Respondent – means a party to a construction contract.

Person – includes the trustees of a trust acting in that capacity.

Associate – under section 7, there is an extensive definition of Associate, but the part which is probably applicable is (e) where one person is a nominee or trustee for the other person. (There are many references to body corporate, but it seems clear that that is a reference to companies or similar bodies and not body corporates under the Unit Titles Act.)

Section 28 provides that an adjudication is initiated by the serving of a written notice of adjudication on:

- (a) the other party or parties to the construction contract; and
- (b) the owner if ... an approval for the issue of a charging order is sought [in respect of the construction site].

It also provides that the notice must state whether or not a determination of an owner's liability and approval for the issue of a charging order in respect of the construction site are being sought.

Section 30 provides that a claimant may, in the notice of adjudication, seek a determination under section 50 that an owner who is not a respondent is jointly and severally liable with the respondent to make a payment and for the approval for the issue of a charging order in respect of the construction site.

Section 31 provides that a claimant may not seek any of the matters referred to in sections 29 (where the construction site is owned by the respondent) or 30 against an owner who is a residential occupier of the construction site.

Section 32 provides that an owner who is not a respondent is a party to the adjudication proceedings in which the claimant seeks a determination of that owner's liability under section 30 (a) and approval for the issue of a charging order under section 30 (b). Such a person has all the rights of a party including the right to be present at the adjudication proceedings and the right to present that owner's case and to be heard.

Section 50 applies if there is a dispute about an amount payable by a respondent under a construction contract and the claimant has sought, in the notice of adjudication, a determination of the owner's liability under section 30 (a) and approval for the issue of a charging order in respect of the construction site under section 30 (b) and the adjudicator has determined that the respondent is liable to pay all or part of the amount claimed in the adjudication and is an associate of the owner.

Subsection 2 provides that for the section to apply, the adjudicator must determine that the owner (each individual unit holder named on the certificates of title) is jointly and severally liable, with a respondent (which might be a body corporate if it is a respondent where, for example, it has contracted for repairs) to pay in whole or in part the amount claimed in the adjudication.

Section 62 (1) provides that a notice of adjudication to be served on a residential occupier under a residential construction contract must, in addition to the matters usually required, set out prominently a statement of the residential occupier's rights and obligations in the adjudication and a brief explanation of the adjudication process. (These requirements are more specifically spelled out in Form 2 of the Regulations.)

Section 62 (3) provides that a notice of adjudication that fails to comply with that requirement "has no effect".

The Unit Titles Act 1972

Section 2 defines a body corporate "... in relation to the units and common property shown on a unit plan and to the proprietor or proprietors of those units, means the body corporate that comprises the said proprietor or proprietors in accordance with section 12 of this Act."

Section 9 (1) provides that the common property is owned by the proprietors as tenants in common in shares proportional to the unit entitlement.

Section 12 provides that on deposit of a unit plan the registered proprietor of the land to which the plan relates shall become a body corporate; and "Thereafter the proprietor or proprietors for the time being of all of the units comprised in the unit plan shall, by virtue of this Act, be the body corporate."

Section 13 entitles the body corporate to sue and be sued, and to enter into contractual arrangements.

Section 15 permits it to carry out certain functions such as obtaining insurance and maintaining the common property.

Section 16 prohibits it from carrying out trading activities.

Section 26 provides for a guarantee to be provided by each proprietor in respect of any rent due by the body corporate.

Section 35 provides that a proprietor shall not be liable to pay or to contribute to the funds of a body corporate for any amount exceeding the amount the proprietor has been levied for.

The Unit Titles Act 2010

This Act comes into force on 20 June 2011 and replaces the Unit Titles Act 1972.

Section 2 defines a body corporate as a body corporate of a unit title development created under section 75 on the deposit of a unit plan.

Section 2 defines common property as all the land and associated fixtures that are part of the unit title development, but are not contained in a principal unit, accessory unit, or future development unit.

Section 38 provides for ownership interest to be based on relative value of the unit in relation to each of the other units and that determines a range of matters, not limited to the beneficial interest of the owner in the common property and voting rights.

Section 50 provides that a stratum estate may be transferred, leased or mortgaged.

Section 54 provides that the common property is owned by the body corporate and the owners of all the units are beneficially entitled to the common property as tenants in common in shares proportional to the ownership interest in respect of their respective units.

Section 72 provides that, with limited exceptions, the provisions of the Land Transfer Act 1952 apply to every stratum estate in freehold and stratum estate in leasehold.

Section 75 provides that a body corporate is created when a unit plan is deposited.

Section 76 provides that the members of a body corporate for a unit plan are the unit owners of all the units in the unit plan.

Section 77 provides that a body corporate may (in addition to anything authorised by the Act) do anything a natural person of full age and capacity may do, except as provided in the Act.

Section 79 provides that an owner of a principal unit has all the rights derived from being registered as the owner of the stratum estate in the unit, hold a share in the common property, is entitled as a body corporate member to exercise voting rights, is entitled to have quiet enjoyment of the unit, may, with certain limitations, make alterations, additions or improvements, has a right to have any dispute resolved as provided for in the Act, has the right to enforce the body corporate operational rules and has the right to attend the general meetings of the body corporate.

Section 80 sets out the responsibilities of owners, which are what one would expect them to be.

Section 84 sets out the powers and duties of a body corporate which include fixing the ownership interest, acting as an agent for unit owners who lease or licence their principal unit, and many other functions which obviously stem from being the body corporate – mainly of an administrative nature, including accounting and insurance, and repairs and maintenance.

Section 121 provides for determining amounts to be levied for different funds.

Section 134 contains more detailed provisions relating to insurance.

Sections 142 and 143 deal with liability issues. In respect of proceedings against the body corporate, it can join a principal unit owner as a co-defendant and any judgement against the body corporate can be entered jointly against the unit only and the body corporate can be indemnified by the unit owner. In respect of proceedings against a body corporate as a defendant in tort, there are similar provisions in relation to the unit owners and also with regard to insurance.

CONSIDERATION OF THE LEGAL POSITION GENERALLY

The starting point must be the intention of the legislation.

Clearly, special protection is intended to be given to owners of residential units who intend to or who do occupy them, in at least three separate respects. First, where the default Payment Claim procedure is to be used; second, where a Notice of Adjudication is being issued; and third, to protect them from the burden of charging orders.

In order to get this protection, those protected must be “an individual”, “who is occupying, or intends to occupy” premises as a “dwellinghouse” and the premises must be the “subject of a construction contract” to which the person is a party.

A residential construction contract is one for construction work in which one of the parties is the residential occupier of the premises that are the subject of the contract.

It is extremely common for parties to construction contracts (including their consultants) to not have the faintest idea about some of the distinctions in the Construction Contracts Act and overlook some of them which might otherwise be to their advantage.

With regard to family trusts where a trustee/beneficiary will be the occupier, I definitely prefer the reasoning in the *IQ Homes* case.

I prefer the approach that a trust is “a bundle of rights and obligations” which apply to the trustees as individuals, and such an approach is consistent with practicality and common sense.

Limited liability companies are (House of Lords decision in *Saloman v Saloman & Co Limited* [1897] AC 22) separate legal entities of a classic kind and cannot be an “individual”.

The interesting and difficult issue is the one of bodies corporate under the Unit Titles Act. I am sure that a definitive decision will ultimately be given in the tranquillity of High Court proceedings.

Returning to the intention of parliament, that is now not so easy to distil where hybrid use has now become quite common.

It is now not unusual to have separate unit titles for commercial use (for example on the ground floor of a block) and other titles for residential use (for example on the first floor). Similarly, there are hybrid legal structures, where some unit titles are in the names of the individuals (not all of whom may be the occupiers) and others are in the names of different legal entities such as limited liability companies and trusts. (The expression “different legal entity” may not be quite correct for trusts.)

The language of the Construction Contracts Act 2002 does not readily accommodate these differing situations.

However, if one looks at what was obviously intended, (and taking into account the “mischief” to be dealt with) I believe a very clear and logical interpretation emerges.

RELEVANT CASE LAW REGARDING FAMILY TRUSTS

Regarding family trusts, there are conflicting District Court cases. In *Grant Hamilton Construction Limited v Trustees of the Japek Trust* (unreported) District Court, Hamilton, CIV – 2008 – 019 – 1630, 25 March 2009, Judge Everitt decided that a contract entered into by trustees was not a residential construction contract.

His Honour held that the trustees could not be classified as individuals within the meaning of the definition of “residential occupier” and that trustees could not act as separate individuals because they must act with unanimity.

In *IQ Homes Limited v Trustees of the Fisher Family Home Trust* District Court, Christchurch, CIV 2009 – 009 – 1314, 31 July 2009 (Macaskill DCJ) (unreported) the Court held that where the construction contract was entered into by the intending occupiers as trustees, it did not make the contract a commercial construction contract. Judge Macaskill said:

In the context of the statutory definitions under discussion, the status of the defendants as trustees simply does not affect the concurrent status of two of them as occupiers. It is not correct to describe the three contracting trustees as a single party. A trust is not a legal entity. It is a bundle of rights, powers and duties that are conveniently described as a trust but which, as a matter of law, actually attach to the individual trustees. Each of the trustees is a contracting party, although their legal relationships with the plaintiff are identical.

There is nothing legally objectionable in recognising the status of two of the three trustees as individuals who are occupiers of the premises. They are individuals and two of them are occupiers of the premises.

In *Dempsey & Woods Civil Contractors Limited v AJ Ajai Investment Consultants Limited and Bakshi* (District Court, Auckland, CIV 2006 – 004 – 2083) Judge Gittos held that it was arguable that Mr Bakshi, as guarantor, and who was the person fronting for the contracting party, was to be regarded as a party to the contract and who also intended to occupy the dwelling house.

The Court ruled, for summary judgement purposes, that there was an arguable defence that one of the parties was also a residential occupier.

In *A Guide to the Construction Contracts Act 2002* (Geoff Bayley and Tomas Kennedy-Grant) it is said in section 4.2.8 under the heading **RESIDENTIAL OCCUPIER**:

The definition of residential occupier includes the description of an individual who is occupying or “intends to occupy” ...

... whether an individual occupies or intends to occupy a premises and, therefore, whether the contract is a residential construction contract or a commercial construction contract is a question of fact to be determined by an adjudicator.

... In the case of a trust which contracts for the construction of a dwellinghouse for occupation by one or more of the beneficiaries of the trust, the contract will not be a residential construction contract because the trust will not qualify as a “residential occupier”. This is so even where the trustees and beneficiaries of the trust are the same persons, because they will contract in one capacity and occupy in another.

In the case of a body corporate of a residential block, the party to the construction contract (the body corporate) does not qualify as a “residential occupier”, so the contract will not be a residential construction contract. ...

It must be remembered that this text (originally published in 2003) rather led the way in this jurisdiction and opinions of the kind mentioned above were perfectly logical.

It was to be expected that they would be tested with the passage of time and it might be that the authors themselves will be reviewing those original opinions.

The passage above has remained unchanged in the Second Edition published in 2009. Because of the lack of any further comment, it would appear that the learned authors were deprived of an opportunity to see or comment on the *IQ Homes* decision prior to publication, so we do not know what view they would now hold.

I am respectfully inclined to the view that:

- A contract with a family trust where at least one or more of the trustees or beneficiaries intend to occupy the residence, will be a residential contract for the reasons given by D C J Macaskill in *IQ Homes*.
- A contract with a limited liability company cannot be a residential contract because it is not an individual and therefore cannot be an individual residential occupier.
- A contract with a body corporate is a contract with a statutory animal having a certain status created by statute and which, for the reasons given below, can be a residential contract if unit holders are individuals who are or intend to be residential owner occupiers.

BODIES CORPORATE GENERALLY

Unit titles and bodies corporate under the Unit Titles Act are creatures of statute and one must look to the statutory provisions which define them and their rights and obligations. To the extent that those are different from what the law might otherwise imply or impose, so be it – the provisions of the Unit Titles Act will prevail.

When approached in this way, much of the mystery disappears.

If you consider the relevant provisions of the Unit Titles Acts, which are referred to earlier, it becomes clear that one simply applies those words to the situation.

I believe that the effect of the legislation (1972 and 2010) is to preserve not only the individual ownership of the titles, but also the individual status of the owners to the extent that the body corporate simply acts for them as a statutory agent with the power to sue and be sued, including to arrange insurance and maintenance and so on.

A convincing pointer to this conclusion is the provisions of section 9 (1972) and section 54 (2010) which provide that common property is owned by the unit holders as tenants in common in appropriate shares.

BODIES CORPORATE AS AGENTS OF UNIT TITLE HOLDERS?

I find it very difficult to understand those statutory provisions unless they create some form of statutory agency. Even if that is going too far, the provisions of the Acts make it absolutely clear that contracts entered into by the body corporate are being entered into by a body which, by statute, is deemed to be the proprietors.

The position of bodies corporate had to be considered briefly by the Supreme Court in respect of the Byron Avenue part of its decisions when North Shore City Council was the appellant, in one case in respect of the body corporate in Sunset Terraces, and in the other case in respect of the body corporate in Byron Avenue. (*North Shore City Council v Body Corporates and Others* [2010] NZSC 158.)

The provisions of the Unit Titles Act 1972 were still applicable.

The Council had argued that as the nature of the loss was economic, and because the body corporate itself had suffered no economic loss, it cannot sue.

The Supreme Court dealt with that argument in the following way:

[57] The foundation for a body corporate's ability to sue in circumstances such as the present is s13 of the Unit Titles Act 1972. Section 13 (1) provides that a body corporate shall be capable of suing and being sued in its corporate name and of doing and suffering all that bodies corporate may do or suffer. Section 13 (2) provides that, without restricting the generality of subsection (1), the body corporate may sue for and in respect of damage or injury to the common property caused by any person, whether that person is a unit proprietor or not.

[58] With respect to the arguments advanced by the Council on this part of the case, it is hard to see why the body corporate cannot do what, on the plain words of s13 (2), it is empowered to do. The subsection is obviously intended to enable bodies corporate to sue on behalf of unit holders who, as tenants in common, own the common property. How the body corporate deploys the fruits of any successful proceeding pursuant to s13 (2) is not an issue that arises on the appeals, nor is it an issue which should lead to any reading down of the plain terms of s13 (2). While the loss caused by damage to common property may be suffered by the unit owners rather than by the body corporate itself, s13 (2) allows the body corporate to sue for that loss on behalf of the unit owners.

[59] Although in some cases there may be complexities, for example where some of the unit owners do not have valid independent claims, these should not be allowed to detract from the general premise contained in s13 (2) that the body corporate may sue for damage and injury to the common property. The decision of the Court of Appeal on this issue was therefore correct.

There is no significant difference between the relevant provisions of the 1972 Act and the 2010 Act and that reasoning, I believe, would continue to apply under the 2010 Act.

The Supreme Court was looking at a narrow issue, but dealt with it in a robust manner.

It did not expressly say that the body corporate is effectively a statutory agent for the unit owners, but that seems to be clearly what it intended.

I therefore find it impossible to accept that a contract with a body corporate, in itself, must mean it is a commercial construction contract.

In my opinion, a contract with a body corporate (for example, for repairs) may be a residential construction contract if the appropriate factual circumstances apply.

However, there does remain much to be clarified.

CONCLUSION

For all of these reasons, I believe the legal position can be summarised as follows:

- (a) The legislation must now be given a broad and wide interpretation to capture the clear intent of parliament, having regard to the fact that the CCA legislation is now clumsily worded in relation to mixed use and mixed underlying ownership.
- (b) A residential owner occupier of a unit title should not be deprived of the three kinds of statutory protection outlined earlier simply because some other owners will use their premises for letting out to non owner occupiers, or for clearly non residential purposes.
- (c) Trustees of a trust can be holding as owner occupiers for a residential purpose.
- (d) Ownership by a company cannot be an individual who is an owner residential occupier.